

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET FD 35557

23/902

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
MOTION TO COMPEL DISCOVERY FROM
UNION PACIFIC RAILROAD COMPANY

ENTERED
Office of Proceedings

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Public Record

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Dated: February 27, 2012

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Pursuant to 49 C.F.R. Part 1114.31, Arkansas Electric Cooperative Corporation ("AECC") moves for an order compelling Union Pacific Railroad Company ("UP") to produce documents responsive to AECC's First Request for Production of Documents ("Discovery Requests"). A copy of the Discovery Requests is attached hereto as Exhibit A. A copy of UP's Responses and Objections to the Discovery Requests is attached hereto as Exhibit B.

BACKGROUND

On March 3, 2011, the Board served its Decision in Arkansas Electric Cooperative Corporation – Petition For Declaratory Order, FD 35305 ("Coal Dust I"), in which it granted AECC's petition and found that "BNSF's Tariff 6041-B Items 100 and 101 constitute an unreasonable practice under 49 USC § 10702." Decision at 16.

Thereafter, BNSF adopted a revised tariff for the ostensible purpose of reducing deposition of coal dust from trains operating on the PRB Joint Line and BNSF's Black Hills Subdivision. Following objections by PRB coal shippers to the new tariff, and

the refusal of BNSF to participate in mediation regarding shippers' concerns, the Board, by Decision served November 22, 2011, instituted this proceeding in the exercise of its "discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty." Reasonableness Of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, FD 35557 ("Coal Dust II"), Decision at 4.

In accordance with the Board's Decision, BNSF and the Western Coal Traffic League (WCTL) jointly moved for a procedural order on December 12, 2011, which the Office of Proceedings granted by fiat on December 16, 2011. Under the procedural schedule, the parties were permitted to engage in discovery until 50 days from the entry of the order approving the schedule, i.e., until February 6, 2012.

UP'S REFUSAL TO PRODUCE DOCUMENTS REQUESTED BY AECC IN DISCOVERY

On January 31, 2012, AECC served its first requests for production of documents on UP. See Exhibit A. On February 21, 2012, UP served on AECC its objections and responses to AECC's discovery. See Exhibit B.

UP objected to many of AECC's document requests and flatly refused to produce documents responsive to all or part of 7 of AECC's 18 requests. With respect to the remaining requests, UP stated that it would produce "responsive, non-privileged" documents, but as of the date of this motion, no documents have been produced, nor has UP advised when they will begin to be produced. 1/

1/ UP objected to producing responsive documents that were created on or before November 1, 2009, although it did not state in its responses that it was refusing to produce such responsive documents. UP also objected to AECC's request that UP provide a "privilege log" of responsive documents being withheld, but again UP did not

After receiving UP's responses and objections, AECC's counsel wrote to UP's counsel requesting that UP reconsider its refusal to provide responsive documents. See Exhibit C, attached. UP's counsel, however, rejected this request. See Exhibit D, attached.

LEGAL STANDARD

A party may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 CFR 1114.21. Relevance is established if the information sought might affect the outcome of a proceeding. Canadian Pacific Railway Company, et al.--Control--Dakota, Minnesota & Eastern Railroad Corp., et al., STB Finance Docket No. 35081, 2008 STB LEXIS 162, at *2 (STB served Mar. 27, 2008) (citing Waterloo Railway Company – Adverse Abandonment - Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No AB-124 (Sub-No 2) (STB served Nov. 14, 2003). "It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id.

The standards governing the Board's discovery rules generally follow those established by the Federal Rules of Civil Procedure. Simplified Standards for Rail Rate Cases, STB Ex-Parte No. 646 (Sub-No. 1), 2007 STB LEXIS 516, at *150 (STB served Sept. 5, 2007) ("[o]ur discovery rules ... follow generally those in the FRCP"). The scope

state that it was refusing to provide such a log. Under these circumstances, AECC will address these objections in this motion.

of discovery is very broad. Ocean Logistics Mgmt., Inc. v NPR. Inc. and Holt Cargo Sys., STB Docket No WCC-102, at 2 (STB served Jan 14, 2000); *see also* Edgar v. Finley, 312 F.2d 533, 535 (8th Cir. 1963) (“it is no longer open to debate that the discovery rules should be given a broad, liberal interpretation”) (citing Hickman v. Taylor, 329 U.S. 495 (1947)).

The Board has made clear that it expects parties to comply with discovery requests “in a prompt and forthright manner.” Ocean Logistics, STB Docket No. WCC-102 at 2. “Failure to answer or boilerplate, generalized responses are not sufficient to satisfy a party’s discovery obligations.” Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104, 2000 STB LEXIS 627, at *19 (STB served Oct. 27, 2000).

Parties are required to act diligently in responding to discovery requests. Palm Bay Int’l, Inc. v. Marchesi Di Barolo S.P.A., No. 09-601, 2009 U.S. Dist. LEXIS 104020, at *27 (E.D.N.Y. Nov. 9, 2009) (finding that party had failed to comply with its discovery obligations and compelling party to make a thorough search for documents); Advanced Card Techs. LLC v. Harvard Label Inc., No. 07-1269, 2009 U.S. Dist. LEXIS 118779, at *2 (W.D. Okla. Dec. 21, 2009) (upholding award of expenses for failure to answer interrogatories fully and conduct a thorough search for documents); DL v. District of Columbia, 251 F.R.D. 38, 48 (D.D.C. 2008) (compelling the District to perform “a complete and thorough search for responsive documents” was consistent with the requirements of the Federal Rules); D’Onofrio v. Sfx Sports Group, Inc., 247 F.R.D. 43, 50 (D.D.C. 2008) (party is expected to search diligently for documents responsive to discovery requests).

Although discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought, conclusory objections relating to burden will not be sufficient to overcome a party's showing of relevance. Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058, 2002 STB LEXIS 527, *7-8 (STB served Sept. 11, 2002) (granting motion to compel extensive information pertaining to BNSF coal movements)

DISCUSSION

A. **UP Improperly Refused To Produce Documents Relating To Costs, Benefits, and Cost-Effectiveness Of The BNSF Tariff**

The Board and federal courts reviewing decisions of the Board and the ICC have frequently observed that it is important to consider the cost-effectiveness and benefits of a practice in determining whether or not it is reasonable. In its decision in Coal Dust I, at 5, the Board said that "a general presumption that a tariff should employ cost-effective practices that are reasonably commercially available is a valid standard to be applied to the coal dust problem". The Board went on to say that "... any tariff provision must be reasonably commensurate economically with the problem it addresses." Coal Dust I, at 6.

In the present proceeding, an important issue will be whether the safe harbor provision of the BNSF tariff is "reasonably commensurate economically with the problem it addresses." AECC is seeking information in discovery regarding that issue. Requests For Production (RFP) Nos. 2(d), 2(e), 11, and 17 (among others) request

documents about this issue. However, to each of these document requests UP has objected, and refused to produce any documents, on the ground that they:

seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, particularly in light of the Board's decision in *Arkansas Electric Cooperative Corporation – Petition For A Declaratory Order*, STB Finance Docket No. 35305 (STB served March 3, 2011).

On the contrary, each of these requests seeks information relevant to assessment of the reasonableness of the safe harbor provision.

- RFP 2(d) and (e) ask for “documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including but not limited to documents that refer or relate to . . . (d) the benefits of such methods; and (e) any comparisons of the costs and benefits of such methods.” This request is directly related to the cost-effectiveness and “economically commensurate” issues.
- RFP 11 asks for “documents since January 1, 2005 that discuss, analyze, or otherwise refer or relate to the composition of ballast foulants on UP mainline trackage between Shawnee Junction and South Morrill, NE.” The safe harbor provision deals solely with reducing the fouling of ballast by coal from rail cars. Therefore, in evaluating the effectiveness of the safe harbor, it is important to know how much ballast fouling is caused by coal and how much by other foulants that are not subject to the safe harbor. It is particularly helpful to have this information about ballast fouling on a main line beyond the Joint Line, because one of the rationales for dust control that BNSF espoused in Coal Dust I is that, without corrective measures, coal dust fouling will extend beyond the Joint Line.
- RFP 17 asks for “documents that discuss, analyze, present, or otherwise refer or relate to the costs paid by BNSF since January 1, 2005 for individual maintenance functions performed on the PRB Joint Line, including but not limited to documentation of reimbursements sought by BNSF for UP's share of such work.” Cost information of this kind can be used to evaluate the costs of maintaining the line with and without the BNSF tariff and its safe harbor, and therefore is essential to analysis of

the cost-effectiveness of the safe harbor and the "economically commensurate" issue. 2/

Accordingly, UP should be compelled to provide the documents requested in AECC's RFPs 2(d), 2(e), 11, and 17.

B. UP Improperly Refused To Produce Documents Relating To Its Efforts (If Any) To Reduce Deposition Of Fugitive Coal From Rail Cars In Transit

In Coal Dust I, at 14, the Board stated unequivocally that "once a railroad accepts a loaded car, it bears the responsibility for transporting the car in a manner that avoids releasing or spilling the shipment." A substantial amount of evidence was presented in Coal Dust I that railroad operating practices (e.g., excessive speed) and maintenance practices (e.g., inadequate switch maintenance) were a major cause of the deposition of coal onto the track. 3/ In evaluating the new BNSF tariff and its safe harbor provision, it will be important to examine the extent to which the deposition of fugitive coal is caused by the way in which the coal is loaded into the car, for which the Board has said shippers are responsible, and the extent to which the deposition of

2/ UP also objected to RFP 17 on the ground that it is "unreasonably cumulative and unnecessarily duplicative to the extent that the information sought was requested from BNSF." The information requested in RFP 17 was indeed requested from BNSF, in greater detail than is being requested from UP. BNSF has generally refused to provide the requested documents, and AECC has moved to compel BNSF to do so. See AECC's Motion To Compel Discovery From BNSF Railway Company, filed Feb. 13, 2012. Where two parties to a proceeding have, or may have, information about the same subject, there is no rule of law that bars asking both parties for the information. This can be helpful if, for example, one of the parties fails to produce all the requested information. As a co-owner of the Joint Line, UP shares the cost of maintenance, although BNSF is required to perform the maintenance. There is no reason why AECC cannot obtain from UP documents about a relevant matter that UP clearly has in its possession.

3/ In its Coal Dust I decision, the Board did not have to decide how such railroad actions affected the reasonableness of the BNSF tariff, because the Board found the tariff unreasonable on other grounds.

fugitive coal is caused by the way the trains are operated and/or the way the track is maintained, for which the Board has said the railroads are responsible.

Therefore, AECC has made several requests, RFPs 3(a), 7, and 15, for documents about how (or whether) the railroads are carrying out their "responsibility for transporting [each] car in a manner that avoids releasing or spilling the shipment". However, to each of these document requests UP has objected, and refused to produce any documents, on the ground that they:

seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, particularly in light of the Board's decision in *Arkansas Electric Cooperative Corporation – Petition For A Declaratory Order*, STB Finance Docket No. 35305 (STB served March 3, 2011).

On the contrary, each of these requests seeks relevant information for evaluating the reasonableness of the safe harbor provision, and is fully consistent with the Board's decision in Coal Dust I.

- RFP 3(a) asks for "documents that refer or relate to actions You [i.e., UP] have taken since January 1, 2005 or plan to take to reduce the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including through (a) changes in Your operating or maintenance practices". Obviously, in evaluating the reasonableness of the safe harbor, which deals with the shippers' role in controlling deposition of fugitive coal, the railroads' role in controlling deposition of fugitive coal during transit, as defined by the Board, has to be considered. It would be unreasonable on its face for the safe harbor to be used by the railroads as a device for surreptitiously shifting to shippers the railroads' responsibilities as defined by the Board.
- RFP 7 asks for "documents related to the effect of railroad operating practices and/or maintenance practices, including but not limited to operating speeds, slack action, modulus changes and/or rough track, on the deposition on rail ballast of fugitive PRB coal." This request is directly

related to the railroads' role in controlling deposition of fugitive coal during transit, as defined by the Board. 4/

- RFP 15 asks for "documents that discuss, analyze, or otherwise refer or relate to changes since January 1, 2005 in UP operating procedures for heavy-haul trains, including but not limited to changes in maximum authorized speeds." Again, this request is directly related to the railroads' role in controlling deposition of fugitive coal during transit, as defined by the Board.

Accordingly, UP should be compelled to provide the documents

requested in AECC's RFPs 3(a), 7, and 15.

C. UP Improperly Refused To Produce Documents Relating To Its Change Of Position Regarding The BNSF Coal Dust Tariff Between Coal Dust I and Coal Dust II

In Coal Dust I, UP took a strong stand on behalf of itself and its customers that it would oppose any effort by BNSF to enforce its tariff on UP trains. In UP's Opening Evidence and Argument in Coal Dust I, filed March 16, 2010, at 17-20, UP said that it opposed or would oppose any attempt by BNSF to apply (via Joint Line operating rules) the terms of BNSF's tariff to UP's contract and/or common carrier customers. UP repeated the same point in its Reply Argument at 17-18, and even went so far as to criticize a shipper witness for including in the costs imposed by the BNSF tariff the cost of applying toppers to UP trains.

4/ UP has also objected to RFP 7 on the ground that "slack action", "modulus changes", and "rough track" are not "railroad operating practices" or "maintenance practices". However, this objection misstates the question. RFP 7 requested documents "related to the effect of railroad operating practices and/or maintenance practices" (emphasis added). Thus, "slack action" is in substantial part an effect of railroad operating practices, including crew training, monitoring, and management; and modulus changes and rough track are an effect of railroad maintenance practices. UP should have no trouble understanding what AECC is asking for.

Yet on September 9, 2011, UP notified AECC (and presumably its other PRB shippers) of its adoption – via the Joint Line operating rules - of the terms of the new BNSF tariff and urged compliance with both the letter and spirit of the new tariff (even for existing contract movements).

What caused UP to change its mind on this important issue? Was this the result of some negotiated deal between the two railroads? Or has UP learned something about the coal dust problem that it did not know in 2010? Or is there some other explanation? AECC wants to know, has a right to know, and believes that the information might be enlightening to the Board.

Accordingly, AECC asked UP to produce “all documents that discuss, analyze, or otherwise refer or relate to the application to UP traffic (i.e., UP trains and UP customers) of BNSF’s Coal Loading Rule and/or PRB Joint Line operating rules pertaining to coal dust, including but not limited to differences between UP’s current position regarding the application of such rules to UP traffic and UP’s position regarding the application to UP traffic of the BNSF coal dust tariff provisions that were the subject of FD 35305.” (emphasis added.) UP objected to this request, and refused to provide any documents, on the ground that the request

is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects to this request because it appears to assume the existence of “differences” in UP’s “positions”.

To the extent that the objection implies that there is something mysterious about the "assumption" that UP's position changed, it is disingenuous. To the extent that the objection is based solely on burdensomeness, it should be rejected. Conclusory assertions of burdensomeness are not sufficient to defeat a request for relevant documents. Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058, 2002 STB LEXIS 527, *7-8 (STB served Sept. 11, 2002) (granting motion to compel extensive information pertaining to BNSF coal movements).

Accordingly, UP should be compelled to provide the documents requested in AECC's RFP 9.

D. UP Should Be Not Be Allowed To Unilaterally Limit The Time Period For Which It Will Produce Responsive Documents.

Generally, AECC asked for documents covering the period from January 1, 2005 to the Close of Discovery. UP, however, objected to the requests to the extent that they seek documents created before November 1, 2009. UP General Objection No. 10. It is not clear whether UP is withholding responsive documents that were created before November 1, 2009. If so, UP should be compelled to produce such responsive documents.

Having said that, AECC is always willing to discuss with another party ways to facilitate proceedings and reduce burdens. In the Request For Production, AECC stated:

AECC is prepared to cooperate with UP to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests.

For example, if documents responsive to AECC's requests in this case were in fact produced in discovery in Coal Dust I, AECC and UP might make a joint motion to permit such documents to be used in Coal Dust II, and if such a motion were granted then UP could be excused from producing the same documents in Coal Dust II. However, until and unless such an arrangement is made and approved by the Board, UP should comply with its discovery obligations.

E. UP Should Be Required To Furnish A "Privilege Log" If It Withholds Responsive Documents.

AECC's requests included an instruction (Instruction 3) that, if UP withheld any responsive documents based on a claim of privilege (or otherwise), UP should provide a log identifying the withheld documents. UP, however, objected to this instruction. UP General Objection No. 17. It is not clear whether UP is refusing to provide a log of withheld responsive documents.

If UP withholds any responsive document, it should be compelled to identify the document and the reason for withholding promptly it in accordance with the Instructions in the Requests For Production, so that AECC can consider filing a motion to compel production of the document.

CONCLUSION

For the foregoing reasons, the Board should overrule UP's objections and compel UP to produce the requested documents immediately.

Respectfully submitted,



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Dated: February 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2012, I caused a copy of the foregoing to be served electronically on all parties of record on the service list in this action.



Eric Von Salzen

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET FD 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

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FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS
TO UNION PACIFIC RAILROAD COMPANY**

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Dated: January 31, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET FD 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS
TO UNION PACIFIC RAILROAD COMPANY**

Arkansas Electric Cooperative Corporation ("AECC") requests that Union Pacific Railroad Company ("UP") produce the following documents within 20 days after service (that is, by February 20, 2012) by delivering them to the offices of McLeod, Watkinson & Miller, Suite 800, One Massachusetts Avenue, N.W., Washington, D.C. 20001. The requests for production of documents set forth below shall be deemed continuing in nature so as to require supplementary responses promptly to be furnished if and when UP obtains further or different information.

AECC is prepared to cooperate with UP to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. If UP has any questions regarding the meaning or scope of any of these discovery requests, the nature of the information and documents responsive to them, or the procedure for producing responsive

material, please contact AECC's counsel, Eric Von Salzen, via email (evonsalzen@mwmlaw.com) or by telephone ((910) 235-5274 (home/office) or (910) 986-1513 (mobile)).

Part I sets forth the documents to be produced; Parts II and III set forth the Definitions and Instructions, respectively.

I. DOCUMENTS TO BE PRODUCED

1. Please produce all documents that contain, reflect, or otherwise refer or relate to studies performed by You or any other Person relating to (a) the quantity of PRB coal lost from rail cars while the coal is in transit by rail; (b) the factors and circumstances that cause PRB coal to be lost from rail cars while the coal is in transit by rail; and/or (c) the locations relative to the track ballast where the PRB coal lost from rail cars while the coal is in transit by rail comes to rest.

2. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including but not limited to documents that refer or relate to:

- (a) the costs of such methods;
- (b) any comparisons of the costs of such methods with the costs of alternative methods;
- (c) the effectiveness of such methods, including on the extent to which the effectiveness of such methods is affected by distance travelled, weather conditions, or other factors;
- (d) the benefits of such methods; and,
- (e) any comparisons of the costs and benefits of such methods.

3. Please produce all documents that refer or relate to actions You have taken since January 1, 2005 or plan to take to reduce the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including through (a) changes in Your operating or maintenance practices; (b) application of toppers or other treatment of coal in loaded cars conducted at Your expense; or (c) other means.

4. Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on employees of railroads, coal mines, coal shippers, or utilities, or on rail cars owned by railroads, coal mines, coal shippers, or utilities (including but not limited to corrosive effects and "buildup" of topping residue after repeated applications), or on other property owned by railroads, coal mines, coal shippers, or utilities (including but not limited to effects of chemical toppings on utility coal-handling or air pollution control equipment and performance).

5. Please produce all documents that refer or relate to communications between You and any Person regarding (a) coal that is lost from rail cars while the coal is in transit by rail; (b) the BNSF Coal Loading Rule; and, (c) PRB Joint Line operating rules pertaining to control of coal dust.

6. Please produce all documents related to studies of methods other than (or in addition to) the application of topper agents to reduce the generation of fugitive coal in transit, including but not limited to the use of active or passive vibration, pressurized water, pneumatic methods, and/or compression.

7. Please produce all documents related to the effect of railroad operating practices and/or maintenance practices, including but not limited to operating speeds, slack

action, modulus changes and/or rough track, on the deposition on rail ballast of fugitive PRB coal.

8. Please produce all documents relating to the reduction or elimination of fugitive PRB coal due to, in whole or in part, changes in profiling and coal sizing implemented by the mines and shippers after January 1, 2005.

9. Please produce all documents that discuss, analyze, or otherwise refer or relate to the application to UP traffic (i.e., UP trains and UP customers) of BNSF's Coal Loading Rule and/or PRB Joint Line operating rules pertaining to coal dust, including but not limited to differences between UP's current position regarding the application of such rules to UP traffic and UP's position regarding the application to UP traffic of the BNSF coal dust tariff provisions that were the subject of FD 35305.

10. Please produce all documents that discuss, analyze, or otherwise refer or relate to observed quantities and locations of fugitive coal on or along UP's mainline trackage between Shawnee Junction and South Morrill, NE.

11. Please produce all documents since January 1, 2005 that discuss, analyze, or otherwise refer or relate to the composition of ballast foulants on UP mainline trackage between Shawnee Junction and South Morrill, NE.

12. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods or standards used by UP to ensure roadbed stability on UP's mainline trackage between Shawnee Junction and South Morrill, NE, including but not limited to the frequencies with which specific inspections and maintenance functions have been scheduled and/or performed.

13. Please produce all documents that discuss, analyze, or otherwise refer or relate to the performance of chemical agents for controlling coal dust and their associated application equipment.

14. Please produce all documents that discuss, analyze, or otherwise refer or relate to losses of PRB coal, including but not limited to the quantities of such losses, from (a) the bottoms of bottom-dump railcars; and, (b) any other cracks, seams, joints, openings, or orifices other than the tops of railcars.

15. Please produce all documents that discuss, analyze, or otherwise refer or relate to changes since January 1, 2005 in UP operating procedures for heavy-haul trains, including but not limited to changes in maximum authorized speeds.

16. Please produce all documents that discuss, analyze, or otherwise refer or relate to standards for the frequency of ballast maintenance activities applicable to UP's mainline trackage between Shawnee Junction and South Morrill, NE.

17. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the costs paid by BNSF since January 1, 2005 for individual maintenance functions performed on the PRB Joint Line, including but not limited to documentation of reimbursements sought by BNSF for UP's share of such work.

18. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantity of PRB coal delivered to customers in each railcar with and without the application of toppers or other measures to control losses of fugitive coal, including but not limited to UP's valuation of coal retention.

II. DEFINITIONS

The following definitions form an integral part of these Requests for Production of Documents:

1. The connectives "and" and "or", as used herein, shall be construed either disjunctively or conjunctively as necessary to bring within the scope of each discovery request all responses that might otherwise be construed to be outside of its scope.
2. "Black Hills Subdivision" means BNSF's independently owned rail lines that extend from Campbell County, Wyoming at the north end of the PRB Joint Line east and southeast toward Edgemont, SD.
3. "BNSF" means BNSF Railway Company, and any affiliates or predecessors thereof.
4. "Coal Loading Rule" means Item 100, and Appendices A and B thereto, of BNSF's Coal Rules publication denominated as Price List 6041-B, as issued on July 14, 2011 and any subsequent iterations thereof.
5. "Communication" means the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form, with another Person, whether Person to Person, in a group, in a meeting, by telephone, letter, telefax, electronic mail, text message, or otherwise, and including without limitation any printed, typed, handwritten, or other readable document, and any tape recording, correspondence, memorandum, report, contract, diary, logbook, minutes, note, study, analysis, survey, and forecast.
6. "Document(s)" is used in the broadest sense permitted by 49 C.F.R. § 1114.30 and should be interpreted to include all writings and records of every type in Your possession,

custody or control, or known by You to exist including but not limited to: electronically stored information, electronic mail, testimony and exhibits, contracts, drafts, agreements, memoranda, correspondence, letters, reports (including drafts, preliminary, intermediate, and final reports), surveys, evaluations, studies (as defined above, including economic and market studies), summaries, comparisons, tabulations, work papers, statistical records, proposals, outlines, charts, books, pamphlets, periodicals, published material, magazines, newspapers, advertisements, brochures, blueprints, graphs, telegrams, photographs, maps, bulletins, corporate or other minutes, notes, diaries, log sheets, calendars, appointment books, address books, schedules, ledgers, journals, transcripts, microfilm, microfiche, computer tapes, computer discs, computer data and printouts, data compilations, mechanical and electrical recordings, telephone and telegraphic communications, data sheets or data processing cards, speeches, and all other records, tables, written, electronic, or otherwise, and drafts of any of the above; including every copy of a document that contains handwritten or other notations or that otherwise does not exactly duplicate the original or any other copy and any attachments or appendices to any document.

7. "Fugitive coal" means coal in any form (e.g., dust, chunks, clumps, etc.) that leaves railcars while in transit, whether the coal exits the rail car from the top, through the bottom, seams, or any other location, due to any cause.

8. "Load Profiling" means loading uncovered coal cars in accordance with the "Redesigned Chute Diagram" included in the Coal Dust Loading Rule.

9. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

10. "PRB" means the Powder River Basin located in Montana and Wyoming.
11. "PRB Joint Line" means the rail line that extends south from Caballo Junction in Campbell County, Wyoming, to connections with BNSF's and Union Pacific Railroad Company's independently owned lines.
12. "Refer or relate to", as well as the terms "relating to", "relates to", "referring to", or "refers to" mean consisting of, making reference to, describing, discussing, reflecting, citing, commenting on, constituting, containing, embodying, evaluating, explaining, supporting, contradicting, regarding, evidencing, concerning, summarizing, or analyzing, or otherwise pertaining to, whether directly or indirectly, the matter.
13. "Studies" means any analyses, reports, evaluations, memoranda, summaries, statistical compilations, presentations, reviews, audits, or other types of written, printed or electronic submissions of information, including drafts, preliminary, intermediate, and final versions.
14. "Topper Agent" means a chemical agent, such as a surfactant, that is applied to coal for the purpose of reducing the amount of coal that is lost from rail cars while the coal is in transit by rail.
15. When used in these requests, the phrase "in transit by rail" should be construed to include the movement of coal over any rail lines by any railroad and is not limited to movements of coal over the PRB Joint Line or the Black Hills Subdivision.
16. "UP" means Union Pacific Railroad Company, and any subsidiaries, affiliates or predecessors thereof, as well as any of its employees, agents, partners, officers, directors,

advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

17. "You" and "Your" refer to UP, as well as any of its employees, agents, partners, officers, directors, advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

III. INSTRUCTIONS

1. In producing the documents requested, you are instructed to furnish all documents within your possession, custody, or control.

2. Unless otherwise indicated, these requests cover the period from January 1, 2005 to the date of Your response.

3. If you withhold any document responsive to a request, indicate the grounds for withholding it, including any claim of privilege, and identify each such document in writing on or before the date specified for production by providing the following information: the type of document (e.g., letter, memorandum, etc.); the date or your best approximation of the date on which the document was prepared; the author(s); the subject matter; the names, addresses, and organization of all persons to whom such document was directed and/or addressed, and/or by whom it was received; and the paragraph number of the request to which such document responds.

4. If you do not have a document responsive to a request, but you know of person(s) or organization(s) who may have all or any portion of the document, then all such information,


including names, addresses, and telephone numbers, shall be disclosed in the response to the request.

5. If any document called for by these requests for production is available in machine-readable format, please produce the document or information in that format, along with a description of the format and a decoder, as well as any other information, necessary and sufficient to permit access to and an understanding of the electronic information.

Respectfully submitted,

Michael A. Nelson
101 Main Street
Dalton, MA 01226
(413) 684-2044

Transportation Consultant



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Washington, DC 20001
(202) 842-2345

Counsel for Arkansas Electric Cooperative
Corporation

Dated: January 31, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January 2012, I caused a copy of the foregoing document to be served electronically on Counsel for Union Pacific Railroad Company, and courtesy copies on other parties of record in this docket.



Eric Von Salzen

EXHIBIT B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**UNION PACIFIC RAILROAD COMPANY'S
RESPONSES AND OBJECTIONS TO
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS**

Union Pacific Railroad Company ("UP"), through undersigned counsel, responds to the First Requests for Production of Documents ("Document Requests") of Arkansas Electric Cooperative Corporation ("AECC") served on January 31, 2012, as follows:

GENERAL RESPONSES

The following General Responses apply to each of AECC's Document Requests:

1. UP will conduct a reasonable search for responsive documents. Subject to the specific and general objections that follow, UP will produce responsive documents as soon as practicable to counsel for the parties of record.
2. When UP states that it will produce responsive documents "to the extent reasonably available," UP is not representing that any such material exists. Rather, UP is representing that it will produce non-privileged responsive material in its possession to the extent it exists and can be located in a reasonable search.
3. Production of documents does not necessarily imply that the documents are relevant to or admissible in this proceeding and is not to be construed as waiving any objection stated herein.

4. UP expressly reserves the right to supplement its responses.

GENERAL OBJECTIONS

The following general objections are made with respect to all of the Document Requests. Any additional specific objections are stated at the beginning of the response to each request for document production.

1. UP objects to production of, and is not producing, documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any privilege.

2. UP objects to the Document Requests to the extent they seek confidential, proprietary, or sensitive nonpublic information relating to third parties because the production of such documents could violate 49 U.S.C. § 11904 or certain contractual obligations to third parties. Subject to and without waiving this objection, UP will produce such information, if not otherwise objectionable, designated “Confidential” or “Highly Confidential,” subject to the terms of the Protective Order in this case. UP reserves the right to seek additional protection as needed.

3. UP objects to the Document Requests to the extent they seek documents relating to issues previously decided by the Board in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011). Issues that were previously decided by the Board are not within the scope of the Board’s proceeding in *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557 (STB served Nov. 22, 2011).

4. UP objects to the Document Requests to the extent that they seek documents relating to individual transportation contracts or proposed contracts between UP and its customers. Such documents are confidential and beyond the scope of BNSF tariff rules.

5. UP objects to the Document Requests to the extent they purport to require UP to search for and produce documents that are not within its possession, custody, or control, including documents in the control of BNSF.

6. UP objects to the Document Requests as unreasonably cumulative and unnecessarily duplicative because they seek documents obtainable from a more convenient, less burdensome, or less expensive source than UP.

7. UP objects to the Document Requests to the extent they relate to Joint Line operational and maintenance characteristics because under the ICC-approved Joint Line Agreement, BNSF is the designated operating carrier and maintenance provider of the Joint Line.

8. UP objects to the Document Requests on the grounds that they are overly broad and unduly burdensome. The Document Requests are excessive, repetitive, and in many cases seek documents that are outside the scope of this proceeding.

9. UP objects to production of, and in general is not producing, public documents that are readily available. Any production by UP of documents in this category shall not be considered a waiver of this objection.

10. UP objects to the Document Requests to the extent they seek information created before November 1, 2009, on the grounds that such requests are overly broad and unduly burdensome because they seek information that was subject of discovery in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305

(STB served Mar. 3, 2011). Any production by UP of documents created before November 1, 2009, shall not be considered a waiver of this objection.

11. UP objects to the Document Requests to the extent they seek expert reports created for prior litigation or that were subject to protective orders.

12. UP objects to the definition of “UP” on the grounds that it is overly broad and purports to impose requirements that are unduly burdensome, beyond the scope of permissible discovery, and neither relevant nor reasonably calculated to lead to the discovery of admissible information because it requests documents from all of UP’s predecessors, contractors, or consultants whose relationship or involvement with UP is irrelevant to this proceeding.

13. UP objects to the definition of “Document(s)” on the grounds that it is overly broad and purports to impose requirements that are unduly burdensome and beyond the scope of permissible discovery in that it includes documents that are not within UP’s possession, custody, or control.

14. UP objects to the definitions of “Refer or relate to,” “relating to,” “referring to,” or “refers to” on the grounds that they are overly broad and purport to impose requirements that are unduly burdensome and beyond the scope of permissible discovery.

15. UP objects to the definition of “Studies” on the grounds that it is vague and purports to require production that is unduly burdensome to the extent the definition includes “other types of written, printed or electronic submissions of information, including drafts, preliminary, [and] intermediate” versions.

16. UP objects to the “Instructions” on the grounds that they are overly broad, unduly burdensome, and inconsistent with the discovery allowed in this proceeding.

17. UP objects to Instruction 3 on the grounds that it is overly broad and unduly burdensome to the extent that it purports to require UP to provide information that is not necessary for assessing the grounds for withholding a document.

18. UP objects to Instructions 4 and 5 on the grounds that they are overly broad and unduly burdensome to the extent that they purport to require UP to provide information that is beyond the scope of permissible discovery.

DOCUMENT PRODUCTION REQUESTS

Request for Production No. 1

Please produce all documents that contain, reflect, or otherwise refer or relate to studies performed by You or any other Person relating to (a) the quantity of PRB coal lost from rail cars while the coal is in transit by rail; (b) the factors and circumstances that cause PRB coal to be lost from rail cars while the coal is in transit by rail; and/or (c) the locations relative to the track ballast where the PRB coal lost from rail cars while the coal is in transit by rail comes to rest.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of "all documents" that "contain, reflect, or otherwise refer or relate to" certain "studies." UP also objects to searching for and producing documents that were produced or submitted in Finance Docket No. 35305 or in prior litigation that arose from the 2005 derailments.

Subject to and without waiving its objections, UP will produce responsive, non-privileged studies, as the term is commonly understood, regarding the specified topics, to the extent reasonably available.

Request for Production No. 2

Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including but not limited to documents that refer or relate to:

- (a) the costs of such methods;
- (b) any comparisons of the costs of such methods with the costs of alternative methods;
- (c) the effectiveness of such methods, including on the extent to which the effectiveness of such methods is affected by distance travelled, weather conditions, or other factors;
- (d) the benefits of such methods; and,
- (e) any comparisons of the costs and benefits of such methods.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” specified topics. UP also objects to Request No. 2(b) on grounds that the term “alternative methods” is ambiguous and vague. UP further objects to searching for and producing documents of the type requested in Request Nos. 2(d) and (e) on the grounds that Request Nos. 2(d) and (e) seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents in connection with Request Nos. 2(a), (b), and (c), to the extent reasonably available.

Request for Production No. 3

Please produce all documents that refer or relate to actions You have taken since January 1, 2005 or plan to take to reduce the amount of PRB coal that is lost from rail cars while

the coal is in transit by rail, including through (a) changes in Your operating or maintenance practices; (b) application of toppers or other treatment of coal in loaded cars conducted at Your expense; or (c) other means.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “refer or relate to” specified “actions.” UP also objects to searching for and producing documents of the type requested in Request No. 3(a) on the grounds that Request No 3(a) seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents in connection with Request Nos. 3(b) and (c), to the extent reasonably available.

Request for Production No. 4

Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on employees of railroads, coal mines, coal shippers, or utilities, or on rail cars owned by railroads, coal mines, coal shippers, or utilities (including but not limited to corrosive effects and “buildup” of topping residue after repeated applications), or on other property owned by railroads, coal mines, coal shippers, or utilities (including but not limited to effects of chemical toppings on utility coal-handling or air pollution control equipment and performance).

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” specified topics. Subject to and without waiving its objections, UP will produce responsive, non-privileged documents, to the extent reasonably available.

Request for Production No. 5

Please produce all documents that refer or relate to communications between You and any Person regarding (a) coal that is lost from rail cars while the coal is in transit by rail; (b) the BNSF Coal Loading Rule; and, (c) PRB Joint Line operating rules pertaining to control of coal dust.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “refer or relate to” certain types of communications.

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents, to the extent reasonably available.

Request for Production No. 6

Please produce all documents related to studies of methods other than (or in addition to) the application of topper agents to reduce the generation of fugitive coal in transit, including but not limited to the use of active or passive vibration, pressurized water, pneumatic methods, and/or compression.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “related to” certain “studies.”

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents, to the extent reasonably available.

Request for Production No. 7

Please produce all documents related to the effect of railroad operating practices and/or maintenance practices, including but not limited to operating speeds, slack action, modulus changes and/or rough track, on the deposition on rail ballast of fugitive PRB coal.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that are “related to” certain topics. UP also objects to this request on the grounds that it is incoherent because “slack action,” “modulus changes,” and “rough track” are not “railroad operating practices” or “maintenance practices.” UP further objects on the grounds that this request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Request for Production No. 8

Please produce all documents relating to the reduction or elimination of fugitive PRB coal due to, in whole or in part, changes in profiling and coal sizing implemented by the mines and shippers after January 1, 2005.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

admissible evidence in that it requests production of “all documents relating to” the specified topic.

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents, to the extent reasonably available.

Request for Production No. 9

Please produce all documents that discuss, analyze, or otherwise refer or relate to the application to UP traffic (i.e., UP trains and UP customers) of BNSF’s Coal Loading Rule and/or PRB Joint Line operating rules pertaining to coal dust, including but not limited to differences between UP’s current position regarding the application of such rules to UP traffic and UP’s position regarding the application to UP traffic of the BNSF coal dust tariff provisions that were the subject of FD 35305.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects to this request on the grounds that it appears to assume the existence of “differences” in UP’s “positions.”

Subject to and without waiving its objections, UP will produce documents sufficient to show UP communications to UP customers regarding the application of BNSF’s coal dust operating rule to UP traffic.

Request for Production No. 10

Please produce all documents that discuss, analyze, or otherwise refer or relate to observed quantities and locations of fugitive coal on or along UP’s mainline trackage between Shawnee Junction and South Morrill, NE.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects to this request on the grounds that all documents that “discuss” or “analyze” the specified topic are neither relevant nor likely to lead to the discovery of admissible evidence related to this proceeding.

Subject to and without waiving its objections, UP will produce responsive, non-privileged studies, as the term is commonly understood, regarding the specified topic, to the extent reasonably available.

Request for Production No. 11

Please produce all documents since January 1, 2005 that discuss, analyze, or otherwise refer or relate to the composition of ballast foulants on UP mainline trackage between Shawnee Junction and South Morrill, NE.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects on the grounds that this request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Request for Production No. 12

Please produce all documents that discuss, analyze, or otherwise refer or relate to methods or standards used by UP to ensure roadbed stability on UP’s mainline trackage between Shawnee Junction and South Morrill, NE, including but not limited to the frequencies with which specific inspections and maintenance functions have been scheduled and/or performed.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects on the grounds that this request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Subject to and without waiving its objections, UP will produce documents sufficient to show the frequencies with which inspections and maintenance functions have been scheduled and/or performed on UP’s mainline track, to the extent reasonably available.

Request for Production No. 13

Please produce all documents that discuss, analyze, or otherwise refer or relate to the performance of chemical agents for controlling coal dust and their associated application equipment.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic.

Subject to and without waiving its objections, UP will produce responsive, non-privileged materials that discuss or analyze the specified topics, to the extent reasonably available.

Request for Production No. 14

Please produce all documents that discuss, analyze, or otherwise refer or relate to losses of PRB coal, including but not limited to the quantities of such losses, from (a) the bottoms of bottom-dump railcars; and, (b) any other cracks, seams, joints, openings, or orifices other than the tops of railcars.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects on the grounds that this request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Request for Production No. 15

Please produce all documents that discuss, analyze, or otherwise refer or relate to changes since January 1, 2005 in UP operating procedures for heavy-haul trains, including but not limited to changes in maximum authorized speeds.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects to this request to the extent it seeks documents that “discuss” or “analyze” the specified topic on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to this proceeding, particularly in that the request is not limited by

commodity or geography and in light of the Board's decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Request for Production No. 16

Please produce all documents that discuss, analyze, or otherwise refer or relate to standards for the frequency of ballast maintenance activities applicable to UP's mainline trackage between Shawnee Junction and South Morrill, NE.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of "all documents" that "otherwise refer or relate to" the specified topic. UP also objects to this request to the extent it seeks documents that "discuss" or "analyze" the specified topic on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to this proceeding, particularly in light of the Board's decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Subject to and without waiving its general objections, UP will produce documents sufficient to show the frequency of UP's ballast maintenance activities applicable to UP's mainline track, to the extent reasonably available.

Request for Production No. 17

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the costs paid by BNSF since January 1, 2005 for individual maintenance functions performed on the PRB Joint Line, including but not limited to documentation of reimbursements sought by BNSF for UP's share of such work.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified costs. UP also objects to this request to the extent it seeks documents that “discuss” or “analyze” or “present” the specified costs on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011). UP further objects to this request on the grounds that it is unreasonably cumulative and unnecessarily duplicative to the extent that the information sought was requested from BNSF.

Request for Production No. 18

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantity of PRB coal delivered to customers in each railcar with and without the application of toppers or other measures to control losses of fugitive coal, including but not limited to UP’s valuation of coal retention.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “present” or “otherwise refer or relate to” the specified topic.

Subject to and without waiving its objections, UP will produce responsive, non-privileged materials that discuss or analyze the specified topic, to the extent reasonably available.

Respectfully submitted,

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*Attorneys for Union Pacific
Railroad Company*

February 21, 2012

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 21st day of February, 2012, I caused a copy of the foregoing UP's Responses and Objections to Arkansas Electric Cooperative Corporation's First Requests for Production of Documents to be served by e-mail and by first-class mail, postage prepaid, on all parties of record in this proceeding.



Michael L. Rosenthal

EXHIBIT C

LAW OFFICE

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ERIC VON SALZEN
OF COUNSEL

February 22, 2012

via email to mrosenthal@cov.com

Michael L. Rosenthal, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

RE: Reasonableness Of BNSF Railway Company Coal Dust Mitigation
Tariff Provisions, FD 35557

Dear Mike:

I am writing to request that UP reconsider its refusal to produce documents in response to some of AECC's discovery requests. I believe that UP's objections may stem from a misunderstanding of the purpose of these requests, which this letter intends to clarify.

RFPs 2(d), 2(e), 11, 14, and 17

UP has objected to these Requests For Production on the ground that they:

seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, particularly in light of the Board's decision in *Arkansas Electric Cooperative Corporation – Petition For A Declaratory Order*, STB Finance Docket No. 35305 (STB served March 3, 2011).

On the contrary, each of these requests seeks information to be used in assessing the benefits, costs, and cost-effectiveness of the safe harbor provisions of the BNSF tariff. The Board and federal courts reviewing decisions of the Board and the ICC have frequently observed that it is important to consider the cost-effectiveness and benefits of a practice in determining whether or not it is reasonable. The Board said this in its recent decision in *Arkansas Electric Cooperative Corporation – Petition For A Declaratory Order*, FD 35305 (served March 3, 2011)

Michael L. Rosenthal, Esq.
February 22, 2012
Page 2

(“Coal Dust I”), at 5 (“a general presumption that a tariff should employ cost-effective practices that are reasonably commercially available is a valid standard to be applied to the coal dust problem”). In Coal Dust I the Board specifically found that “. . . any tariff provision must be reasonably commensurate economically with the problem it addresses.” Decision at 6. Information regarding costs and benefits is needed in the present proceeding to determine whether this standard is satisfied by the safe harbor provisions.

UP has also objected to RFP 17 on the ground that it is “unreasonably cumulative and unnecessarily duplicative to the extent that the information sought was requested from BNSF.” Where two parties to a proceeding have, or may have, information about the same subject, there is no rule of law that bars asking both parties for the information. This can be helpful if, for example, one of the parties fails to produce all the requested information.

RFPs 3(a), 7, and 15

UP has objected to AECC’s requests on the ground that they:

seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition For A Declaratory Order*, STB Finance Docket No. 35305 (STB served March 3, 2011).

On the contrary, each of these requests seeks information about actions (if any) taken by UP to reduce coal losses while in transit. Substantial evidence was presented in Coal Dust I that railroad operating practices (e.g., excessive speed) and maintenance practices (e.g., inadequate switch maintenance) were a major cause of the deposition of coal onto the track. The Board did not have to address that issue in its decision, because it found the tariff unreasonable on other grounds, but the Board did expressly state that “once a railroad accepts a loaded car, it bears the responsibility for transporting the car in a manner that avoids releasing or spilling the shipment.” Decision at 14. Thus, to evaluate the reasonableness of the safe harbor provision of the new tariff, it is necessary to consider the factors not within shippers’ control that contribute to coal deposition.

UP has also objected to RFP 7 on the ground that “slack action”, “modulus changes”, and “rough track” are not “railroad operating practices” or “maintenance practices”. However, your objection misstates the question. RFP 7 requested documents “related to the effect of railroad operating practices and/or maintenance practices” (emphasis added). Thus, “slack action” is in substantial part a result of railroad operating practices, including crew training, monitoring, and management, and modulus changes and rough track result from

Michael L. Rosenthal, Esq.
February 22, 2012
Page 3

railroad maintenance practices. UP should have no trouble understanding what AECC is asking for.

RFP 9

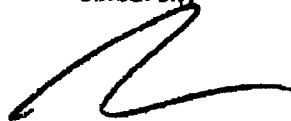
UP has objected to this request on the ground that it:

is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, in that it requests production of "all documents" that "otherwise refer or relate to" the specified topic. UP also objects to this request because it appears to assume the existence of "differences" in UP's "positions".

In UP's Opening Evidence and Argument in Coal Dust I, filed March 16, 2010, at 17-20, UP said that it opposed or would oppose any attempt by BNSF to apply (via Joint Line operating rules) the terms of BNSF's tariff to UP's contract and/or common carrier customers. UP repeated the same point in its Reply Argument at 17-18, and even went so far as to criticize a shipper witness for including in the costs imposed by the BNSF tariff the cost of applying toppers to UP trains. Yet on September 9, 2011, UP notified AECC (and presumably its other PRB shippers) of its adoption - via the Joint Line operating rules - of the terms of the new BNSF tariff and urged compliance with both the letter and spirit of the new tariff (even for existing contract movements). That is clearly a "different" "position". AECC is asking for documents that explain why. I'm prepared to discuss narrowing the scope of this request (perhaps from "all documents that . . . refer or relate to" this change, to "documents sufficient to explain" it), but AECC is clearly entitled to ask about this dramatic about-face.

Therefore, I request that you advise me, by the end of this week, whether UP will reconsider its refusal to produce documents in the foregoing categories.

Sincerely,

A handwritten signature in black ink, appearing to be 'Eric Von Salzen', written over a horizontal line.

Eric Von Salzen

cc: Mr. Steve Sharp

EXHIBIT D

COVINGTON & BURLING LLP

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February 24, 2012

Eric Von Salzen, Esq.
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, DC 20001-1401

Re: Reasonableness of BNSF Railway Company Coal Dust Mitigation
Tariff Provisions, FD-35557

Dear Eric:

UP has carefully considered your letter of February 22, 2012, in which you attempted to clarify the purpose of certain AECC document requests. UP does not believe that your descriptions of the information AECC seeks in Document Request Nos. 2(d), 2(e), 3(a), 7, 11, 14, 15, and 17 accurately reflect the substance of those requests. In any event, UP continues to believe that the documents AECC seeks through those requests are neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding. Moreover, your letter does not address UP's objections to the unduly burdensome and overbroad nature of those requests. Accordingly, UP stands by its objections.

With regard to Document Request No. 9, UP rejects your claim that it has changed its position regarding BNSF's right to impose BNSF's coal loading rule on UP customers using the Joint Line operating rules. UP's communications urging customers to comply voluntarily with the Joint Line operating rule on loading coal cars are consistent with UP's statements in Finance Docket No. 35305. As UP stated in response to Document Request No. 9, UP will produce documents sufficient to show its communications to its customers regarding the application of BNSF's coal dust operating rule to UP traffic.

Sincerely,



Michael L. Rosenthal

cc: Louise A. Rinn, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET FD 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
MOTION TO COMPEL DISCOVERY FROM
UNION PACIFIC RAILROAD COMPANY**

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**Counsel for Arkansas Electric Cooperative
Corporation**

Dated: February 27, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
MOTION TO COMPEL DISCOVERY FROM
UNION PACIFIC RAILROAD COMPANY

Pursuant to 49 C.F.R. Part 1114.31, Arkansas Electric Cooperative Corporation ("AECC") moves for an order compelling Union Pacific Railroad Company ("UP") to produce documents responsive to AECC's First Request for Production of Documents ("Discovery Requests"). A copy of the Discovery Requests is attached hereto as Exhibit A. A copy of UP's Responses and Objections to the Discovery Requests is attached hereto as Exhibit B.

BACKGROUND

On March 3, 2011, the Board served its Decision in Arkansas Electric Cooperative Corporation – Petition For Declaratory Order, FD 35305 ("Coal Dust I"), in which it granted AECC's petition and found that "BNSF's Tariff 6041-B Items 100 and 101 constitute an unreasonable practice under 49 USC § 10702." Decision at 16.

Thereafter, BNSF adopted a revised tariff for the ostensible purpose of reducing deposition of coal dust from trains operating on the PRB Joint Line and BNSF's Black Hills Subdivision. Following objections by PRB coal shippers to the new tariff, and

the refusal of BNSF to participate in mediation regarding shippers' concerns, the Board, by Decision served November 22, 2011, instituted this proceeding in the exercise of its "discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty." Reasonableness Of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, FD 35557 ("Coal Dust II"), Decision at 4.

In accordance with the Board's Decision, BNSF and the Western Coal Traffic League (WCTL) jointly moved for a procedural order on December 12, 2011, which the Office of Proceedings granted by fiat on December 16, 2011. Under the procedural schedule, the parties were permitted to engage in discovery until 50 days from the entry of the order approving the schedule, i.e., until February 6, 2012.

UP'S REFUSAL TO PRODUCE DOCUMENTS REQUESTED BY AECC IN DISCOVERY

On January 31, 2012, AECC served its first requests for production of documents on UP. See Exhibit A. On February 21, 2012, UP served on AECC its objections and responses to AECC's discovery. See Exhibit B.

UP objected to many of AECC's document requests and flatly refused to produce documents responsive to all or part of 7 of AECC's 18 requests. With respect to the remaining requests, UP stated that it would produce "responsive, non-privileged" documents, but as of the date of this motion, no documents have been produced, nor has UP advised when they will begin to be produced. 1/

1/ UP objected to producing responsive documents that were created on or before November 1, 2009, although it did not state in its responses that it was refusing to produce such responsive documents. UP also objected to AECC's request that UP provide a "privilege log" of responsive documents being withheld, but again UP did not

After receiving UP's responses and objections, AECC's counsel wrote to UP's counsel requesting that UP reconsider its refusal to provide responsive documents. See Exhibit C, attached. UP's counsel, however, rejected this request. See Exhibit D, attached.

LEGAL STANDARD

A party may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 CFR 1114.21. Relevance is established if the information sought might affect the outcome of a proceeding. Canadian Pacific Railway Company, et al.--Control--Dakota, Minnesota & Eastern Railroad Corp., et al., STB Finance Docket No. 35081, 2008 STB LEXIS 162, at *2 (STB served Mar. 27, 2008) (citing Waterloo Railway Company – Adverse Abandonment - Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No AB-124 (Sub-No 2) (STB served Nov. 14, 2003). "It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id.

The standards governing the Board's discovery rules generally follow those established by the Federal Rules of Civil Procedure. Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1), 2007 STB LEXIS 516, at *150 (STB served Sept. 5, 2007) ("[o]ur discovery rules ... follow generally those in the FRCP"). The scope

state that it was refusing to provide such a log. Under these circumstances, AECC will address these objections in this motion.

of discovery is very broad. Ocean Logistics Mgmt., Inc. v NPR. Inc. and Holt Cargo Sys., STB Docket No WCC-102, at 2 (STB served Jan 14, 2000); *see also* Edgar v. Finley, 312 F.2d 533, 535 (8th Cir. 1963) (“it is no longer open to debate that the discovery rules should be given a broad, liberal interpretation”) (citing Hickman v. Taylor, 329 U.S. 495 (1947)).

The Board has made clear that it expects parties to comply with discovery requests “in a prompt and forthright manner.” Ocean Logistics, STB Docket No. WCC-102 at 2. “Failure to answer or boilerplate, generalized responses are not sufficient to satisfy a party’s discovery obligations.” Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104, 2000 STB LEXIS 627, at *19 (STB served Oct. 27, 2000).

Parties are required to act diligently in responding to discovery requests. Palm Bay Int’l, Inc. v. Marchesi Di Barolo S.P.A., No. 09-601, 2009 U.S. Dist. LEXIS 104020, at *27 (E.D.N.Y. Nov. 9, 2009) (finding that party had failed to comply with its discovery obligations and compelling party to make a thorough search for documents); Advanced Card Techs. LLC v. Harvard Label Inc., No. 07-1269, 2009 U.S. Dist. LEXIS 118779, at *2 (W.D. Okla. Dec. 21, 2009) (upholding award of expenses for failure to answer interrogatories fully and conduct a thorough search for documents); DL v. District of Columbia, 251 F.R.D. 38, 48 (D.D.C. 2008) (compelling the District to perform “a complete and thorough search for responsive documents” was consistent with the requirements of the Federal Rules); D’Onofrio v. Sfx Sports Group, Inc., 247 F.R.D. 43, 50 (D.D.C. 2008) (party is expected to search diligently for documents responsive to discovery requests).

Although discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought, conclusory objections relating to burden will not be sufficient to overcome a party's showing of relevance. Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058, 2002 STB LEXIS 527, *7-8 (STB served Sept. 11, 2002) (granting motion to compel extensive information pertaining to BNSF coal movements)

DISCUSSION

A. **UP Improperly Refused To Produce Documents Relating To Costs, Benefits, and Cost-Effectiveness Of The BNSF Tariff**

The Board and federal courts reviewing decisions of the Board and the ICC have frequently observed that it is important to consider the cost-effectiveness and benefits of a practice in determining whether or not it is reasonable. In its decision in Coal Dust I, at 5, the Board said that "a general presumption that a tariff should employ cost-effective practices that are reasonably commercially available is a valid standard to be applied to the coal dust problem". The Board went on to say that "... any tariff provision must be reasonably commensurate economically with the problem it addresses." Coal Dust I, at 6.

In the present proceeding, an important issue will be whether the safe harbor provision of the BNSF tariff is "reasonably commensurate economically with the problem it addresses." AECC is seeking information in discovery regarding that issue. Requests For Production (RFP) Nos. 2(d), 2(e), 11, and 17 (among others) request

documents about this issue. However, to each of these document requests UP has objected, and refused to produce any documents, on the ground that they:

seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, particularly in light of the Board's decision in *Arkansas Electric Cooperative Corporation – Petition For A Declaratory Order*, STB Finance Docket No. 35305 (STB served March 3, 2011).

On the contrary, each of these requests seeks information relevant to assessment of the reasonableness of the safe harbor provision.

- RFP 2(d) and (e) ask for “documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including but not limited to documents that refer or relate to . . . (d) the benefits of such methods; and (e) any comparisons of the costs and benefits of such methods.” This request is directly related to the cost-effectiveness and “economically commensurate” issues.
- RFP 11 asks for “documents since January 1, 2005 that discuss, analyze, or otherwise refer or relate to the composition of ballast foulants on UP mainline trackage between Shawnee Junction and South Morrill, NE.” The safe harbor provision deals solely with reducing the fouling of ballast by coal from rail cars. Therefore, in evaluating the effectiveness of the safe harbor, it is important to know how much ballast fouling is caused by coal and how much by other foulants that are not subject to the safe harbor. It is particularly helpful to have this information about ballast fouling on a main line beyond the Joint Line, because one of the rationales for dust control that BNSF espoused in Coal Dust I is that, without corrective measures, coal dust fouling will extend beyond the Joint Line.
- RFP 17 asks for “documents that discuss, analyze, present, or otherwise refer or relate to the costs paid by BNSF since January 1, 2005 for individual maintenance functions performed on the PRB Joint Line, including but not limited to documentation of reimbursements sought by BNSF for UP's share of such work.” Cost information of this kind can be used to evaluate the costs of maintaining the line with and without the BNSF tariff and its safe harbor, and therefore is essential to analysis of

the cost-effectiveness of the safe harbor and the “economically commensurate” issue. ^{2/}

Accordingly, UP should be compelled to provide the documents requested in AECC’s RFPs 2(d), 2(e), 11, and 17.

B. UP Improperly Refused To Produce Documents Relating To Its Efforts (If Any) To Reduce Deposition Of Fugitive Coal From Rail Cars In Transit

In Coal Dust I, at 14, the Board stated unequivocally that “once a railroad accepts a loaded car, it bears the responsibility for transporting the car in a manner that avoids releasing or spilling the shipment.” A substantial amount of evidence was presented in Coal Dust I that railroad operating practices (e.g., excessive speed) and maintenance practices (e.g., inadequate switch maintenance) were a major cause of the deposition of coal onto the track. ^{3/} In evaluating the new BNSF tariff and its safe harbor provision, it will be important to examine the extent to which the deposition of fugitive coal is caused by the way in which the coal is loaded into the car, for which the Board has said shippers are responsible, and the extent to which the deposition of

^{2/} UP also objected to RFP 17 on the ground that it is “unreasonably cumulative and unnecessarily duplicative to the extent that the information sought was requested from BNSF.” The information requested in RFP 17 was indeed requested from BNSF, in greater detail than is being requested from UP. BNSF has generally refused to provide the requested documents, and AECC has moved to compel BNSF to do so. See AECC’s Motion To Compel Discovery From BNSF Railway Company, filed Feb. 13, 2012. Where two parties to a proceeding have, or may have, information about the same subject, there is no rule of law that bars asking both parties for the information. This can be helpful if, for example, one of the parties fails to produce all the requested information. As a co-owner of the Joint Line, UP shares the cost of maintenance, although BNSF is required to perform the maintenance. There is no reason why AECC cannot obtain from UP documents about a relevant matter that UP clearly has in its possession.

^{3/} In its Coal Dust I decision, the Board did not have to decide how such railroad actions affected the reasonableness of the BNSF tariff, because the Board found the tariff unreasonable on other grounds.

fugitive coal is caused by the way the trains are operated and/or the way the track is maintained, for which the Board has said the railroads are responsible.

Therefore, AECC has made several requests, RFPs 3(a), 7, and 15, for documents about how (or whether) the railroads are carrying out their “responsibility for transporting [each] car in a manner that avoids releasing or spilling the shipment”. However, to each of these document requests UP has objected, and refused to produce any documents, on the ground that they:

seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition For A Declaratory Order*, STB Finance Docket No. 35305 (STB served March 3, 2011).

On the contrary, each of these requests seeks relevant information for evaluating the reasonableness of the safe harbor provision, and is fully consistent with the Board’s decision in Coal Dust I.

- RFP 3(a) asks for “documents that refer or relate to actions You [i.e., UP] have taken since January 1, 2005 or plan to take to reduce the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including through (a) changes in Your operating or maintenance practices”. Obviously, in evaluating the reasonableness of the safe harbor, which deals with the shippers’ role in controlling deposition of fugitive coal, the railroads’ role in controlling deposition of fugitive coal during transit, as defined by the Board, has to be considered. It would be unreasonable on its face for the safe harbor to be used by the railroads as a device for surreptitiously shifting to shippers the railroads’ responsibilities as defined by the Board.
- RFP 7 asks for “documents related to the effect of railroad operating practices and/or maintenance practices, including but not limited to operating speeds, slack action, modulus changes and/or rough track, on the deposition on rail ballast of fugitive PRB coal.” This request is directly

related to the railroads' role in controlling deposition of fugitive coal during transit, as defined by the Board. 4/

- RFP 15 asks for "documents that discuss, analyze, or otherwise refer or relate to changes since January 1, 2005 in UP operating procedures for heavy-haul trains, including but not limited to changes in maximum authorized speeds." Again, this request is directly related to the railroads' role in controlling deposition of fugitive coal during transit, as defined by the Board.

Accordingly, UP should be compelled to provide the documents requested in AECC's RFPs 3(a), 7, and 15.

C. UP Improperly Refused To Produce Documents Relating To Its Change Of Position Regarding The BNSF Coal Dust Tariff Between Coal Dust I and Coal Dust II

In Coal Dust I, UP took a strong stand on behalf of itself and its customers that it would oppose any effort by BNSF to enforce its tariff on UP trains. In UP's Opening Evidence and Argument in Coal Dust I, filed March 16, 2010, at 17-20, UP said that it opposed or would oppose any attempt by BNSF to apply (via Joint Line operating rules) the terms of BNSF's tariff to UP's contract and/or common carrier customers. UP repeated the same point in its Reply Argument at 17-18, and even went so far as to criticize a shipper witness for including in the costs imposed by the BNSF tariff the cost of applying toppers to UP trains.

4/ UP has also objected to RFP 7 on the ground that "slack action", "modulus changes", and "rough track" are not "railroad operating practices" or "maintenance practices". However, this objection misstates the question. RFP 7 requested documents "related to the effect of railroad operating practices and/or maintenance practices" (emphasis added). Thus, "slack action" is in substantial part an effect of railroad operating practices, including crew training, monitoring, and management; and modulus changes and rough track are an effect of railroad maintenance practices. UP should have no trouble understanding what AECC is asking for.

Yet on September 9, 2011, UP notified AECC (and presumably its other PRB shippers) of its adoption – via the Joint Line operating rules - of the terms of the new BNSF tariff and urged compliance with both the letter and spirit of the new tariff (even for existing contract movements).

What caused UP to change its mind on this important issue? Was this the result of some negotiated deal between the two railroads? Or has UP learned something about the coal dust problem that it did not know in 2010? Or is there some other explanation? AECC wants to know, has a right to know, and believes that the information might be enlightening to the Board.

Accordingly, AECC asked UP to produce “all documents that discuss, analyze, or otherwise refer or relate to the application to UP traffic (i.e., UP trains and UP customers) of BNSF’s Coal Loading Rule and/or PRB Joint Line operating rules pertaining to coal dust, including but not limited to differences between UP’s current position regarding the application of such rules to UP traffic and UP’s position regarding the application to UP traffic of the BNSF coal dust tariff provisions that were the subject of FD 35305.” (emphasis added.) UP objected to this request, and refused to provide any documents, on the ground that the request

is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects to this request because it appears to assume the existence of “differences” in UP’s “positions”.

To the extent that the objection implies that there is something mysterious about the “assumption” that UP’s position changed, it is disingenuous. To the extent that the objection is based solely on burdensomeness, it should be rejected. Conclusory assertions of burdensomeness are not sufficient to defeat a request for relevant documents. Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058, 2002 STB LEXIS 527, *7-8 (STB served Sept. 11, 2002) (granting motion to compel extensive information pertaining to BNSF coal movements).

Accordingly, UP should be compelled to provide the documents requested in AECC’s RFP 9.

D. UP Should Be Not Be Allowed To Unilaterally Limit The Time Period For Which It Will Produce Responsive Documents.

Generally, AECC asked for documents covering the period from January 1, 2005 to the Close of Discovery. UP, however, objected to the requests to the extent that they seek documents created before November 1, 2009. UP General Objection No. 10. It is not clear whether UP is withholding responsive documents that were created before November 1, 2009. If so, UP should be compelled to produce such responsive documents.

Having said that, AECC is always willing to discuss with another party ways to facilitate proceedings and reduce burdens. In the Request For Production, AECC stated:

AECC is prepared to cooperate with UP to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests.

For example, if documents responsive to AECC's requests in this case were in fact produced in discovery in Coal Dust I, AECC and UP might make a joint motion to permit such documents to be used in Coal Dust II, and if such a motion were granted then UP could be excused from producing the same documents in Coal Dust II. However, until and unless such an arrangement is made and approved by the Board, UP should comply with its discovery obligations.

E. UP Should Be Required To Furnish A "Privilege Log" If It Withholds Responsive Documents.

AECC's requests included an instruction (Instruction 3) that, if UP withheld any responsive documents based on a claim of privilege (or otherwise), UP should provide a log identifying the withheld documents. UP, however, objected to this instruction. *UP General Objection No. 17. It is not clear whether UP is refusing to provide a log of withheld responsive documents.*

If UP withholds any responsive document, it should be compelled to identify the document and the reason for withholding promptly it in accordance with the Instructions in the Requests For Production, so that AECC can consider filing a motion to compel production of the document.

CONCLUSION

For the foregoing reasons, the Board should overrule UP's objections and compel UP to produce the requested documents immediately.

Respectfully submitted,



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Transportation Consultant


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(202) 842-2345

Counsel for Arkansas Electric Cooperative
Corporation

Dated: February 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2012, I caused a copy of the foregoing to be served electronically on all parties of record on the service list in this action.



Eric Von Salzen

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET FD 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS
TO UNION PACIFIC RAILROAD COMPANY**

**Michael A. Nelson
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**Counsel for Arkansas Electric Cooperative
Corporation**

Dated: January 31, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET FD 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS
TO UNION PACIFIC RAILROAD COMPANY**

Arkansas Electric Cooperative Corporation ("AECC") requests that Union Pacific Railroad Company ("UP") produce the following documents within 20 days after service (that is, by February 20, 2012) by delivering them to the offices of McLeod, Watkinson & Miller, Suite 800, One Massachusetts Avenue, N.W., Washington, D.C. 20001. The requests for production of documents set forth below shall be deemed continuing in nature so as to require supplementary responses promptly to be furnished if and when UP obtains further or different information.

AECC is prepared to cooperate with UP to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. If UP has any questions regarding the meaning or scope of any of these discovery requests, the nature of the information and documents responsive to them, or the procedure for producing responsive

material, please contact AECC's counsel, Eric Von Salzen, via email (evonsalzen@mwmlaw.com) or by telephone ((910) 235-5274 (home/office) or (910) 986-1513 (mobile)).

Part I sets forth the documents to be produced; Parts II and III set forth the Definitions and Instructions, respectively.

I. DOCUMENTS TO BE PRODUCED

1. Please produce all documents that contain, reflect, or otherwise refer or relate to studies performed by You or any other Person relating to (a) the quantity of PRB coal lost from rail cars while the coal is in transit by rail; (b) the factors and circumstances that cause PRB coal to be lost from rail cars while the coal is in transit by rail; and/or (c) the locations relative to the track ballast where the PRB coal lost from rail cars while the coal is in transit by rail comes to rest.

2. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including but not limited to documents that refer or relate to:

- (a) the costs of such methods;
- (b) any comparisons of the costs of such methods with the costs of alternative methods;
- (c) the effectiveness of such methods, including on the extent to which the effectiveness of such methods is affected by distance travelled, weather conditions, or other factors;
- (d) the benefits of such methods; and,
- (e) any comparisons of the costs and benefits of such methods.

3. Please produce all documents that refer or relate to actions You have taken since January 1, 2005 or plan to take to reduce the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including through (a) changes in Your operating or maintenance practices; (b) application of toppers or other treatment of coal in loaded cars conducted at Your expense; or (c) other means.

4. Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on employees of railroads, coal mines, coal shippers, or utilities, or on rail cars owned by railroads, coal mines, coal shippers, or utilities (including but not limited to corrosive effects and "buildup" of topping residue after repeated applications), or on other property owned by railroads, coal mines, coal shippers, or utilities (including but not limited to effects of chemical toppings on utility coal-handling or air pollution control equipment and performance).

5. Please produce all documents that refer or relate to communications between You and any Person regarding (a) coal that is lost from rail cars while the coal is in transit by rail; (b) the BNSF Coal Loading Rule; and, (c) PRB Joint Line operating rules pertaining to control of coal dust.

6. Please produce all documents related to studies of methods other than (or in addition to) the application of topper agents to reduce the generation of fugitive coal in transit, including but not limited to the use of active or passive vibration, pressurized water, pneumatic methods, and/or compression.

7. Please produce all documents related to the effect of railroad operating practices and/or maintenance practices, including but not limited to operating speeds, slack

action, modulus changes and/or rough track, on the deposition on rail ballast of fugitive PRB coal.

8. Please produce all documents relating to the reduction or elimination of fugitive PRB coal due to, in whole or in part, changes in profiling and coal sizing implemented by the mines and shippers after January 1, 2005.

9. Please produce all documents that discuss, analyze, or otherwise refer or relate to the application to UP traffic (i.e., UP trains and UP customers) of BNSF's Coal Loading Rule and/or PRB Joint Line operating rules pertaining to coal dust, including but not limited to differences between UP's current position regarding the application of such rules to UP traffic and UP's position regarding the application to UP traffic of the BNSF coal dust tariff provisions that were the subject of FD 35305.

10. Please produce all documents that discuss, analyze, or otherwise refer or relate to observed quantities and locations of fugitive coal on or along UP's mainline trackage between Shawnee Junction and South Morrill, NE.

11. Please produce all documents since January 1, 2005 that discuss, analyze, or otherwise refer or relate to the composition of ballast foulants on UP mainline trackage between Shawnee Junction and South Morrill, NE.

12. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods or standards used by UP to ensure roadbed stability on UP's mainline trackage between Shawnee Junction and South Morrill, NE, including but not limited to the frequencies with which specific inspections and maintenance functions have been scheduled and/or performed.

13. Please produce all documents that discuss, analyze, or otherwise refer or relate to the performance of chemical agents for controlling coal dust and their associated application equipment.

14. Please produce all documents that discuss, analyze, or otherwise refer or relate to losses of PRB coal, including but not limited to the quantities of such losses, from (a) the bottoms of bottom-dump railcars; and, (b) any other cracks, seams, joints, openings, or orifices other than the tops of railcars.

15. Please produce all documents that discuss, analyze, or otherwise refer or relate to changes since January 1, 2005 in UP operating procedures for heavy-haul trains, including but not limited to changes in maximum authorized speeds.

16. Please produce all documents that discuss, analyze, or otherwise refer or relate to standards for the frequency of ballast maintenance activities applicable to UP's mainline trackage between Shawnee Junction and South Morrill, NE.

17. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the costs paid by BNSF since January 1, 2005 for individual maintenance functions performed on the PRB Joint Line, including but not limited to documentation of reimbursements sought by BNSF for UP's share of such work.

18. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantity of PRB coal delivered to customers in each railcar with and without the application of toppers or other measures to control losses of fugitive coal, including but not limited to UP's valuation of coal retention.

II. DEFINITIONS

The following definitions form an integral part of these Requests for Production of Documents:

1. The connectives "and" and "or", as used herein, shall be construed either disjunctively or conjunctively as necessary to bring within the scope of each discovery request all responses that might otherwise be construed to be outside of its scope.
2. "Black Hills Subdivision" means BNSF's independently owned rail lines that extend from Campbell County, Wyoming at the north end of the PRB Joint Line east and southeast toward Edgemont, SD.
3. "BNSF" means BNSF Railway Company, and any affiliates or predecessors thereof.
4. "Coal Loading Rule" means Item 100, and Appendices A and B thereto, of BNSF's Coal Rules publication denominated as Price List 6041-B, as issued on July 14, 2011 and any subsequent iterations thereof.
5. "Communication" means the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form, with another Person, whether Person to Person, in a group, in a meeting, by telephone, letter, telefax, electronic mail, text message, or otherwise, and including without limitation any printed, typed, handwritten, or other readable document, and any tape recording, correspondence, memorandum, report, contract, diary, logbook, minutes, note, study, analysis, survey, and forecast.
6. "Document(s)" is used in the broadest sense permitted by 49 C.F.R. § 1114.30 and should be interpreted to include all writings and records of every type in Your possession,

custody or control, or known by You to exist including but not limited to: electronically stored information, electronic mail, testimony and exhibits, contracts, drafts, agreements, memoranda, correspondence, letters, reports (including drafts, preliminary, intermediate, and final reports), surveys, evaluations, studies (as defined above, including economic and market studies), summaries, comparisons, tabulations, work papers, statistical records, proposals, outlines, charts, books, pamphlets, periodicals, published material, magazines, newspapers, advertisements, brochures, blueprints, graphs, telegrams, photographs, maps, bulletins, corporate or other minutes, notes, diaries, log sheets, calendars, appointment books, address books, schedules, ledgers, journals, transcripts, microfilm, microfiche, computer tapes, computer discs, computer data and printouts, data compilations, mechanical and electrical recordings, telephone and telegraphic communications, data sheets or data processing cards, speeches, and all other records, tables, written, electronic, or otherwise, and drafts of any of the above; including every copy of a document that contains handwritten or other notations or that otherwise does not exactly duplicate the original or any other copy and any attachments or appendices to any document.

7. "Fugitive coal" means coal in any form (e.g., dust, chunks, clumps, etc.) that leaves railcars while in transit, whether the coal exits the rail car from the top, through the bottom, seams, or any other location, due to any cause.

8. "Load Profiling" means loading uncovered coal cars in accordance with the "Redesigned Chute Diagram" included in the Coal Dust Loading Rule.

9. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

10. "PRB" means the Powder River Basin located in Montana and Wyoming.
11. "PRB Joint Line" means the rail line that extends south from Caballo Junction in Campbell County, Wyoming, to connections with BNSF's and Union Pacific Railroad Company's independently owned lines.
12. "Refer or relate to", as well as the terms "relating to", "relates to", "referring to", or "refers to" mean consisting of, making reference to, describing, discussing, reflecting, citing, commenting on, constituting, containing, embodying, evaluating, explaining, supporting, contradicting, regarding, evidencing, concerning, summarizing, or analyzing, or otherwise pertaining to, whether directly or indirectly, the matter.
13. "Studies" means any analyses, reports, evaluations, memoranda, summaries, statistical compilations, presentations, reviews, audits, or other types of written, printed or electronic submissions of information, including drafts, preliminary, intermediate, and final versions.
14. "Topper Agent" means a chemical agent, such as a surfactant, that is applied to coal for the purpose of reducing the amount of coal that is lost from rail cars while the coal is in transit by rail.
15. When used in these requests, the phrase "in transit by rail" should be construed to include the movement of coal over any rail lines by any railroad and is not limited to movements of coal over the PRB Joint Line or the Black Hills Subdivision.
16. "UP" means Union Pacific Railroad Company, and any subsidiaries, affiliates or predecessors thereof, as well as any of its employees, agents, partners, officers, directors,

advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

17. "You" and "Your" refer to UP, as well as any of its employees, agents, partners, officers, directors, advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

III. INSTRUCTIONS

1. In producing the documents requested, you are instructed to furnish all documents within your possession, custody, or control.

2. Unless otherwise indicated, these requests cover the period from January 1, 2005 to the date of Your response.

3. If you withhold any document responsive to a request, indicate the grounds for withholding it, including any claim of privilege, and identify each such document in writing on or before the date specified for production by providing the following information: the type of document (e.g., letter, memorandum, etc.); the date or your best approximation of the date on which the document was prepared; the author(s); the subject matter; the names, addresses, and organization of all persons to whom such document was directed and/or addressed, and/or by whom it was received; and the paragraph number of the request to which such document responds.

4. If you do not have a document responsive to a request, but you know of person(s) or organization(s) who may have all or any portion of the document, then all such information,


including names, addresses, and telephone numbers, shall be disclosed in the response to the request.

5. If any document called for by these requests for production is available in machine-readable format, please produce the document or information in that format, along with a description of the format and a decoder, as well as any other information, necessary and sufficient to permit access to and an understanding of the electronic information.

Respectfully submitted,

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(413) 684-2044

Transportation Consultant




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Counsel for Arkansas Electric Cooperative
Corporation

Dated: January 31, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January 2012, I caused a copy of the foregoing document to be served electronically on Counsel for Union Pacific Railroad Company, and courtesy copies on other parties of record in this docket.



Eric Von Salzen

EXHIBIT B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**UNION PACIFIC RAILROAD COMPANY'S
RESPONSES AND OBJECTIONS TO
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS**

Union Pacific Railroad Company ("UP"), through undersigned counsel, responds to the First Requests for Production of Documents ("Document Requests") of Arkansas Electric Cooperative Corporation ("AECC") served on January 31, 2012, as follows:

GENERAL RESPONSES

The following General Responses apply to each of AECC's Document Requests:

1. UP will conduct a reasonable search for responsive documents. Subject to the specific and general objections that follow, UP will produce responsive documents as soon as practicable to counsel for the parties of record.
2. When UP states that it will produce responsive documents "to the extent reasonably available," UP is not representing that any such material exists. Rather, UP is representing that it will produce non-privileged responsive material in its possession to the extent it exists and can be located in a reasonable search.
3. Production of documents does not necessarily imply that the documents are relevant to or admissible in this proceeding and is not to be construed as waiving any objection stated herein.

4. UP expressly reserves the right to supplement its responses.

GENERAL OBJECTIONS

The following general objections are made with respect to all of the Document Requests. Any additional specific objections are stated at the beginning of the response to each request for document production.

1. UP objects to production of, and is not producing, documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any privilege.

2. UP objects to the Document Requests to the extent they seek confidential, proprietary, or sensitive nonpublic information relating to third parties because the production of such documents could violate 49 U.S.C. § 11904 or certain contractual obligations to third parties. Subject to and without waiving this objection, UP will produce such information, if not otherwise objectionable, designated “Confidential” or “Highly Confidential,” subject to the terms of the Protective Order in this case. UP reserves the right to seek additional protection as needed.

3. UP objects to the Document Requests to the extent they seek documents relating to issues previously decided by the Board in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011). Issues that were previously decided by the Board are not within the scope of the Board’s proceeding in *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557 (STB served Nov. 22, 2011).

4. UP objects to the Document Requests to the extent that they seek documents relating to individual transportation contracts or proposed contracts between UP and its customers. Such documents are confidential and beyond the scope of BNSF tariff rules.

5. UP objects to the Document Requests to the extent they purport to require UP to search for and produce documents that are not within its possession, custody, or control, including documents in the control of BNSF.

6. UP objects to the Document Requests as unreasonably cumulative and unnecessarily duplicative because they seek documents obtainable from a more convenient, less burdensome, or less expensive source than UP.

7. UP objects to the Document Requests to the extent they relate to Joint Line operational and maintenance characteristics because under the ICC-approved Joint Line Agreement, BNSF is the designated operating carrier and maintenance provider of the Joint Line.

8. UP objects to the Document Requests on the grounds that they are overly broad and unduly burdensome. The Document Requests are excessive, repetitive, and in many cases seek documents that are outside the scope of this proceeding.

9. UP objects to production of, and in general is not producing, public documents that are readily available. Any production by UP of documents in this category shall not be considered a waiver of this objection.

10. UP objects to the Document Requests to the extent they seek information created before November 1, 2009, on the grounds that such requests are overly broad and unduly burdensome because they seek information that was subject of discovery in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305

(STB served Mar. 3, 2011). Any production by UP of documents created before November 1, 2009, shall not be considered a waiver of this objection.

11. UP objects to the Document Requests to the extent they seek expert reports created for prior litigation or that were subject to protective orders.

12. UP objects to the definition of “UP” on the grounds that it is overly broad and purports to impose requirements that are unduly burdensome, beyond the scope of permissible discovery, and neither relevant nor reasonably calculated to lead to the discovery of admissible information because it requests documents from all of UP’s predecessors, contractors, or consultants whose relationship or involvement with UP is irrelevant to this proceeding.

13. UP objects to the definition of “Document(s)” on the grounds that it is overly broad and purports to impose requirements that are unduly burdensome and beyond the scope of permissible discovery in that it includes documents that are not within UP’s possession, custody, or control.

14. UP objects to the definitions of “Refer or relate to,” “relating to,” “referring to,” or “refers to” on the grounds that they are overly broad and purport to impose requirements that are unduly burdensome and beyond the scope of permissible discovery.

15. UP objects to the definition of “Studies” on the grounds that it is vague and purports to require production that is unduly burdensome to the extent the definition includes “other types of written, printed or electronic submissions of information, including drafts, preliminary, [and] intermediate” versions.

16. UP objects to the “Instructions” on the grounds that they are overly broad, unduly burdensome, and inconsistent with the discovery allowed in this proceeding.

17. UP objects to Instruction 3 on the grounds that it is overly broad and unduly burdensome to the extent that it purports to require UP to provide information that is not necessary for assessing the grounds for withholding a document.

18. UP objects to Instructions 4 and 5 on the grounds that they are overly broad and unduly burdensome to the extent that they purport to require UP to provide information that is beyond the scope of permissible discovery.

DOCUMENT PRODUCTION REQUESTS

Request for Production No. 1

Please produce all documents that contain, reflect, or otherwise refer or relate to studies performed by You or any other Person relating to (a) the quantity of PRB coal lost from rail cars while the coal is in transit by rail; (b) the factors and circumstances that cause PRB coal to be lost from rail cars while the coal is in transit by rail; and/or (c) the locations relative to the track ballast where the PRB coal lost from rail cars while the coal is in transit by rail comes to rest.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of "all documents" that "contain, reflect, or otherwise refer or relate to" certain "studies." UP also objects to searching for and producing documents that were produced or submitted in Finance Docket No. 35305 or in prior litigation that arose from the 2005 derailments.

Subject to and without waiving its objections, UP will produce responsive, non-privileged studies, as the term is commonly understood, regarding the specified topics, to the extent reasonably available.

Request for Production No. 2

Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including but not limited to documents that refer or relate to:

- (a) the costs of such methods;
- (b) any comparisons of the costs of such methods with the costs of alternative methods;
- (c) the effectiveness of such methods, including on the extent to which the effectiveness of such methods is affected by distance travelled, weather conditions, or other factors;
- (d) the benefits of such methods; and,
- (e) any comparisons of the costs and benefits of such methods.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” specified topics. UP also objects to Request No. 2(b) on grounds that the term “alternative methods” is ambiguous and vague. UP further objects to searching for and producing documents of the type requested in Request Nos. 2(d) and (e) on the grounds that Request Nos. 2(d) and (e) seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents in connection with Request Nos. 2(a), (b), and (c), to the extent reasonably available.

Request for Production No. 3

Please produce all documents that refer or relate to actions You have taken since January 1, 2005 or plan to take to reduce the amount of PRB coal that is lost from rail cars while

the coal is in transit by rail, including through (a) changes in Your operating or maintenance practices; (b) application of toppers or other treatment of coal in loaded cars conducted at Your expense; or (c) other means.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “refer or relate to” specified “actions.” UP also objects to searching for and producing documents of the type requested in Request No. 3(a) on the grounds that Request No 3(a) seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents in connection with Request Nos. 3(b) and (c), to the extent reasonably available.

Request for Production No. 4

Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on employees of railroads, coal mines, coal shippers, or utilities, or on rail cars owned by railroads, coal mines, coal shippers, or utilities (including but not limited to corrosive effects and “buildup” of topping residue after repeated applications), or on other property owned by railroads, coal mines, coal shippers, or utilities (including but not limited to effects of chemical toppings on utility coal-handling or air pollution control equipment and performance).

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” specified topics. Subject to and without waiving its objections, UP will produce responsive, non-privileged documents, to the extent reasonably available.

Request for Production No. 5

Please produce all documents that refer or relate to communications between You and any Person regarding (a) coal that is lost from rail cars while the coal is in transit by rail; (b) the BNSF Coal Loading Rule; and, (c) PRB Joint Line operating rules pertaining to control of coal dust.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “refer or relate to” certain types of communications.

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents, to the extent reasonably available.

Request for Production No. 6

Please produce all documents related to studies of methods other than (or in addition to) the application of topper agents to reduce the generation of fugitive coal in transit, including but not limited to the use of active or passive vibration, pressurized water, pneumatic methods, and/or compression.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “related to” certain “studies.”

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents, to the extent reasonably available.

Request for Production No. 7

Please produce all documents related to the effect of railroad operating practices and/or maintenance practices, including but not limited to operating speeds, slack action, modulus changes and/or rough track, on the deposition on rail ballast of fugitive PRB coal.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that are “related to” certain topics. UP also objects to this request on the grounds that it is incoherent because “slack action,” “modulus changes,” and “rough track” are not “railroad operating practices” or “maintenance practices.” UP further objects on the grounds that this request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Request for Production No. 8

Please produce all documents relating to the reduction or elimination of fugitive PRB coal due to, in whole or in part, changes in profiling and coal sizing implemented by the mines and shippers after January 1, 2005.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

admissible evidence in that it requests production of “all documents relating to” the specified topic.

Subject to and without waiving its objections, UP will produce responsive, non-privileged documents, to the extent reasonably available.

Request for Production No. 9

Please produce all documents that discuss, analyze, or otherwise refer or relate to the application to UP traffic (i.e., UP trains and UP customers) of BNSF’s Coal Loading Rule and/or PRB Joint Line operating rules pertaining to coal dust, including but not limited to differences between UP’s current position regarding the application of such rules to UP traffic and UP’s position regarding the application to UP traffic of the BNSF coal dust tariff provisions that were the subject of FD 35305.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects to this request on the grounds that it appears to assume the existence of “differences” in UP’s “positions.”

Subject to and without waiving its objections, UP will produce documents sufficient to show UP communications to UP customers regarding the application of BNSF’s coal dust operating rule to UP traffic.

Request for Production No. 10

Please produce all documents that discuss, analyze, or otherwise refer or relate to observed quantities and locations of fugitive coal on or along UP’s mainline trackage between Shawnee Junction and South Morrill, NE.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of

admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects to this request on the grounds that all documents that “discuss” or “analyze” the specified topic are neither relevant nor likely to lead to the discovery of admissible evidence related to this proceeding.

Subject to and without waiving its objections, UP will produce responsive, non-privileged studies, as the term is commonly understood, regarding the specified topic, to the extent reasonably available.

Request for Production No. 11

Please produce all documents since January 1, 2005 that discuss, analyze, or otherwise refer or relate to the composition of ballast foulants on UP mainline trackage between Shawnee Junction and South Morrill, NE.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects on the grounds that this request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Request for Production No. 12

Please produce all documents that discuss, analyze, or otherwise refer or relate to methods or standards used by UP to ensure roadbed stability on UP’s mainline trackage between Shawnee Junction and South Morrill, NE, including but not limited to the frequencies with which specific inspections and maintenance functions have been scheduled and/or performed.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects on the grounds that this request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Subject to and without waiving its objections, UP will produce documents sufficient to show the frequencies with which inspections and maintenance functions have been scheduled and/or performed on UP’s mainline track, to the extent reasonably available.

Request for Production No. 13

Please produce all documents that discuss, analyze, or otherwise refer or relate to the performance of chemical agents for controlling coal dust and their associated application equipment.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic.

Subject to and without waiving its objections, UP will produce responsive, non-privileged materials that discuss or analyze the specified topics, to the extent reasonably available.

Request for Production No. 14

Please produce all documents that discuss, analyze, or otherwise refer or relate to losses of PRB coal, including but not limited to the quantities of such losses, from (a) the bottoms of bottom-dump railcars; and, (b) any other cracks, seams, joints, openings, or orifices other than the tops of railcars.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects on the grounds that this request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant in this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Request for Production No. 15

Please produce all documents that discuss, analyze, or otherwise refer or relate to changes since January 1, 2005 in UP operating procedures for heavy-haul trains, including but not limited to changes in maximum authorized speeds.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified topic. UP also objects to this request to the extent it seeks documents that “discuss” or “analyze” the specified topic on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to this proceeding, particularly in that the request is not limited by

commodity or geography and in light of the Board's decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Request for Production No. 16

Please produce all documents that discuss, analyze, or otherwise refer or relate to standards for the frequency of ballast maintenance activities applicable to UP's mainline trackage between Shawnee Junction and South Morrill, NE.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of "all documents" that "otherwise refer or relate to" the specified topic. UP also objects to this request to the extent it seeks documents that "discuss" or "analyze" the specified topic on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to this proceeding, particularly in light of the Board's decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

Subject to and without waiving its general objections, UP will produce documents sufficient to show the frequency of UP's ballast maintenance activities applicable to UP's mainline track, to the extent reasonably available.

Request for Production No. 17

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the costs paid by BNSF since January 1, 2005 for individual maintenance functions performed on the PRB Joint Line, including but not limited to documentation of reimbursements sought by BNSF for UP's share of such work.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “otherwise refer or relate to” the specified costs. UP also objects to this request to the extent it seeks documents that “discuss” or “analyze” or “present” the specified costs on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011). UP further objects to this request on the grounds that it is unreasonably cumulative and unnecessarily duplicative to the extent that the information sought was requested from BNSF.

Request for Production No. 18

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantity of PRB coal delivered to customers in each railcar with and without the application of toppers or other measures to control losses of fugitive coal, including but not limited to UP’s valuation of coal retention.

UP Response:

UP objects to this request on the grounds that it is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in that it requests production of “all documents” that “present” or “otherwise refer or relate to” the specified topic.

Subject to and without waiving its objections, UP will produce responsive, non-privileged materials that discuss or analyze the specified topic, to the extent reasonably available.

Respectfully submitted,

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*Attorneys for Union Pacific
Railroad Company*

February 21, 2012

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 21st day of February, 2012, I caused a copy of the foregoing UP's Responses and Objections to Arkansas Electric Cooperative Corporation's First Requests for Production of Documents to be served by e-mail and by first-class mail, postage prepaid, on all parties of record in this proceeding.



Michael L. Rosenthal

EXHIBIT C

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February 24, 2012

Eric Von Salzen, Esq.
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Re: Reasonableness of BNSF Railway Company Coal Dust Mitigation
Tariff Provisions, FD 35557

Dear Eric:

UP has carefully considered your letter of February 22, 2012, in which you attempted to clarify the purpose of certain AECC document requests. UP does not believe that your descriptions of the information AECC seeks in Document Request Nos. 2(d), 2(e), 3(a), 7, 11, 14, 15, and 17 accurately reflect the substance of those requests. In any event, UP continues to believe that the documents AECC seeks through those requests are neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding. Moreover, your letter does not address UP's objections to the unduly burdensome and overbroad nature of those requests. Accordingly, UP stands by its objections.

With regard to Document Request No. 9, UP rejects your claim that it has changed its position regarding BNSF's right to impose BNSF's coal loading rule on UP customers using the Joint Line operating rules. UP's communications urging customers to comply voluntarily with the Joint Line operating rule on loading coal cars are consistent with UP's statements in Finance Docket No. 35305. As UP stated in response to Document Request No. 9, UP will produce documents sufficient to show its communications to its customers regarding the application of BNSF's coal dust operating rule to UP traffic.

Sincerely,



Michael L. Rosenthal

cc: Louise A. Rinn, Esq.

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February 22, 2012
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(“Coal Dust I”), at 5 (“a general presumption that a tariff should employ cost-effective practices that are reasonably commercially available is a valid standard to be applied to the coal dust problem”). In Coal Dust I the Board specifically found that “. . . any tariff provision must be reasonably commensurate economically with the problem it addresses.” Decision at 6. Information regarding costs and benefits is needed in the present proceeding to determine whether this standard is satisfied by the safe harbor provisions.

UP has also objected to RFP 17 on the ground that it is “unreasonably cumulative and unnecessarily duplicative to the extent that the information sought was requested from BNSF.” Where two parties to a proceeding have, or may have, information about the same subject, there is no rule of law that bars asking both parties for the information. This can be helpful if, for example, one of the parties fails to produce all the requested information.

RFPs 3(a), 7, and 15

UP has objected to AECC’s requests on the ground that they:

seek information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, particularly in light of the Board’s decision in *Arkansas Electric Cooperative Corporation – Petition For A Declaratory Order*, STB Finance Docket No. 35305 (STB served March 3, 2011).

On the contrary, each of these requests seeks information about actions (if any) taken by UP to reduce coal losses while in transit. Substantial evidence was presented in Coal Dust I that railroad operating practices (e.g., excessive speed) and maintenance practices (e.g., inadequate switch maintenance) were a major cause of the deposition of coal onto the track. The Board did not have to address that issue in its decision, because it found the tariff unreasonable on other grounds, but the Board did expressly state that “once a railroad accepts a loaded car, it bears the responsibility for transporting the car in a manner that avoids releasing or spilling the shipment.” Decision at 14. Thus, to evaluate the reasonableness of the safe harbor provision of the new tariff, it is necessary to consider the factors not within shippers’ control that contribute to coal deposition.

UP has also objected to RFP 7 on the ground that “slack action”, “modulus changes”, and “rough track” are not “railroad operating practices” or “maintenance practices”. However, your objection misstates the question. RFP 7 requested documents “related to the effect of railroad operating practices and/or maintenance practices” (emphasis added). Thus, “slack action” is in substantial part a result of railroad operating practices, including crew training, monitoring, and management; and modulus changes and rough track result from

Michael L. Rosenthal, Esq.
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railroad maintenance practices. UP should have no trouble understanding what AECC is asking for.

RFP 9

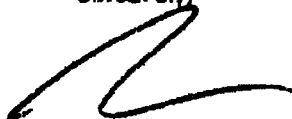
UP has objected to this request on the ground that it:

is unduly burdensome, overbroad, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this proceeding, in that it requests production of "all documents" that "otherwise refer or relate to" the specified topic. UP also objects to this request because it appears to assume the existence of "differences" in UP's "positions".

In UP's Opening Evidence and Argument in Coal Dust I, filed March 16, 2010, at 17-20, UP said that it opposed or would oppose any attempt by BNSF to apply (via Joint Line operating rules) the terms of BNSF's tariff to UP's contract and/or common carrier customers. UP repeated the same point in its Reply Argument at 17-18, and even went so far as to criticize a shipper witness for including in the costs imposed by the BNSF tariff the cost of applying toppers to UP trains. Yet on September 9, 2011, UP notified AECC (and presumably its other PRB shippers) of its adoption - via the Joint Line operating rules - of the terms of the new BNSF tariff and urged compliance with both the letter and spirit of the new tariff (even for existing contract movements). That is clearly a "different" "position". AECC is asking for documents that explain why. I'm prepared to discuss narrowing the scope of this request (perhaps from "all documents that . . . refer or relate to" this change, to "documents sufficient to explain" it), but AECC is clearly entitled to ask about this dramatic about-face.

Therefore, I request that you advise me, by the end of this week, whether UP will reconsider its refusal to produce documents in the foregoing categories.

Sincerely,

A handwritten signature in black ink, appearing to be 'Eric Von Salzen', written over a horizontal line.

Eric Von Salzen

cc: Mr. Steve Sharp

EXHIBIT D

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February 24, 2012

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Re: Reasonableness of BNSF Railway Company Coal Dust Mitigation
Tariff Provisions, FD 35557

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